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**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case No: CA11/01

In the appeal between:

COUNTY FAIR FOODS (PTY)LTD

Appellant

and

OCGAWU

**1ST
Respondent**

CLIVE JONES

2ND Respondent

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal from a decision of the Labour Court in a dispute between the appellant, on the one hand, and the respondents, on the other, on whether the appellant's dismissal of the second respondent was unfair and, if so, what relief was appropriate.

The facts

- [2] The appellant is a producer of fresh and frozen chickens. It is based in the Western Cape. Its chickens are bred, slaughtered and processed in the Western Cape but are distributed throughout South Africa and Namibia. The appellant's premises in the Western Cape are at Hocroft where it has an abattoir. It has a large production plant at Epping - still within the Western Cape. The processing of chickens is conducted at the Epping facility. The Epping facility has two operations, namely, the fresh food production plant and an operation referred to as the "**New Market Cold Store**". The former employs about 450 employees and the latter, 18. It would seem that the New Market Cold Store facility is used for the refrigeration of both fresh and frozen chickens before their distribution.
- [3] The first respondent is a trade union of which the second respondent is a member. The second respondent, Mr Clive Jones, was employed by the appellant in 1989 as a packer. In 1991 he was transferred to the fresh produce department at

New Market. There he was employed as what is known within the appellant's operations as a "**new order make-up**". In that capacity the second respondent was responsible for the compilation of orders prior to dispatch.

[4] In September 1999 the second respondent was promoted to the position of a forklift driver in which he was required to operate a forklift in various parts of the cold store or to load trucks for delivery to retailers. The appellant had five forklift drivers including the second respondent. There were three shifts which the forklift drivers worked. These were the early shift which ran from 06h30 to 16h15, the day shift which ran from 07h30 to 17h15 and the late shift which was from 10h30 to 20h30. The second respondent worked the day shift only whereas the other four forklift drivers alternated between the early shift and the late shift every fortnight.

[5] In December 1999 an employee who had been employed as head of one of the departments in the cold store was dismissed. His dismissal meant that his position became vacant and somebody had to be appointed to that position. The appellant filled that vacancy by promoting one of the forklift drivers to that position. This meant that there were now four forklift drivers instead of five.

[6] On the 9th December 1999 the appellant issued a document that it called "**Employee Communique/brief**". For convenience I shall refer

to such documents in this judgement simply as memoranda. The appellant used to communicate with its employees and their representatives in this manner. The heading of the document of the 9th December was: **“Notice of the Company’s intention to rationalize the New Market Department.”** The document read thus:-

“We refer the (sic) Company’s on-going rationalization of the Company’s operational and business activities in an ongoing endeavour to try and improve the Company’s competitive advantage and market share, overhead costs structure, productivity, operational and business related efficiencies, resource utilization and profitability.

In furtherance of the Company’s on-going rationalization, the Company herewith gives notice of the Company’s intention and proposal to rationalize the Company’s New Market Department, with the view to re-align the New Market Department’s operational activities with the Company’s other operational and

business related activities, with effect from 01 January 2000.

In the light of the successful internal appointment of one of the Company's staggered shift Forklift Drivers to the position of Departmental Head, the Company proposes to reduce the number of Forklift Driver positions from five to four positions in future.

The Company further proposes to transfer one of the Company's current day shift Forklift Drivers onto the Company's staggered shift arrangement to fill the vacancy created by the recent Department Head promotion.

The Company accordingly invites our employees and their collective bargaining representative, OCGAWU to consult with the Company on the Company's rationalization proposal, as set out here above.

Should any of our employees have any queries and/or proposals concerning the contents of the employee communiqué/brief, please do not hesitate to contact your immediate superior in this regard.

We trust that our employees will find the above in order and look forward to meaningful consultations in this regard. Thank you."

[7] It will be seen from the memorandum that the appellant was proposing to do away with the day shift. As that is the shift which the second

respondent worked,⁶ the proposal affected him directly. In the memorandum the appellant invited the employees as well as the first respondent to consult with it on its rationalisation proposal. The memorandum was put on the notice board in the company and was faxed to the union. The appellant's proposal entailed that the second respondent would work like the other forklift drivers, namely, alternate between the early and late shifts. He refused to work on that basis giving church commitments that he had in the evenings as the reason why he was not prepared to work the same shifts as the other forklift drivers. The second respondent was prepared to work the early shift but not the late shift. The difficulty with this was that the forklift driver who had been promoted and whose position the second respondent had to fill had worked on the basis of alternating between the early and late shifts.

- [8] From the 5th to the 30th January 2000 certain of the appellant's employees, including the second respondent, participated in a strike. Apparently the appellant also purported to lock the striking employees out during the strike. The strike and

lock-out came to an end on the 31st January 2000 when the second respondent returned to work. He was the last one of the employees to return to work. During the strike/lock-out the appellant had operated with four forklift driver. The other three forklift drivers had not participated in the strike. The second respondent's position had been temporarily filled by a casual employee who, unlike the second respondent, worked the same shifts as the other forklift drivers. The system of four forklift drivers had worked efficiently. This was the system that the appellant had proposed before the strike.

[9] On the second respondent's return to work on the 31st January a discussion took place between Mr Coetzee, the second

respondent's immediate superior, and the second respondent. During this discussion Mr Coetzee told the second respondent that he expected him to fall into the new shift system the next day. The second respondent replied that he was not prepared to do so. According to Mr Coetzee, he told the second respondent that the latter would be retrenched if he did not fall into the new

shift system the next day.

[10] A meeting was held later on the same day which was attended by Mr Coetzee, Mr Visser, who was the general manager of the appellant's operations, and the second respondent. In that meeting further attempts were made to urge the second respondent to agree to work the new shift system but he continued to refuse. Mr Visser repeated to the second respondent the rationale behind the reduction from five to four forklift drivers. He also told the second respondent that, if he did not accept the staggered shift system, the alternative that remained was a retrenchment without any severance pay because the appellant had offered him an alternative position.

[11] At this stage of the events there is a conflict between Mr Visser's version and the second respondent's version. On Mr Visser's version he and the second respondent reached an agreement that the second respondent take a week off on full pay to go home and think about the issue. On the second respondent's version, Mr Visser told the second respondent that the latter was suspended until the 7th February which was a date scheduled for a meeting between the appellant and the union to discuss organisational rights. The second respondent's version is the one to be preferred in this regard because the appellant's own

memorandum of the 1st February supports his version unequivocally. In that memorandum the appellant referred to the second respondent as having been suspended. The material contents of that memorandum are quoted in paragraph 13 hereunder.

[12] On the same day, namely the 31st January, the union sent a letter to the appellant. In that letter the union alleged that threats had been made to the second respondent on that day to unilaterally change his working conditions and to retrench him. It alleged that those threats were unlawful and urged the appellant to refrain from carrying them out and to apologise to the second respondent. The union also said that it remained open for consultation if the appellant wanted to consult it on a need to change the second respondent's working conditions.

[13] On the 1st February 2000 the appellant issued another memorandum. The material parts of that memorandum read thus:

“We also refer to the Company's various

notices in this regard with specific reference of (sic) Company's New Market Cold Storage Department and the introduction of a staggered shift practice, with effect from 01 January, 2000, as part and parcel thereof.

We refer to the OCGAWU letter dated 31 January 2000, concerning OCGAWU's objection to the Company's alleged unilateral amendment of the terms and conditions of service of Clive Jones, one of the OCGAWU Shop Stewards and his refusal to work in accordance with the Company's new staggered shift practice.

Clive Jones is the only employee in the Company's New Market Colds (sic) Storage Department, who has refused to work in accordance with the Company's new staggered shift practice.

We in the last instance refer to the provisions of the Labour Relations Act, which allows(sic) an employer to retrench employees, who unreasonably refuse to accept an offer of alternative employment with that employer, without the benefit of a severance package.

We regret that in the light of the timeous notice of the Company's intention to rationalise the operational activities of the, (sic) Clive Jones's refusal to work in accordance with the

Company's new staggered shift

system, the Company's operational and business related requirements and in the absence of meaningful, viable and/feasible (sic) alternative to the Company's staggered shift rationalisation measures, the Company has no real alternative but to formally retrench him, with effect from 01 February, 2000 and without the benefit of a severance package.

In an (sic) good faith endeavour to assist Clive Jones in finalising his decision concerning his compliance with the Company's new staggered shift practice the Company has decided to suspend Clive Jones with full pay until the collective consultation meeting between the Company and OCGAWU at 10H00 on Monday, 07 February, 2000, concerning the Company's rationalisation intentions and proposals.

The Company will further not implement Clive Jones's retrenchment, subject to and conditional on the parties' collective consultation meeting, in accordance with the provisions of the Labour Relations Act concerning the dismissal/retrenchment of Shop Stewards.

Clive Jones's services with the Company are therefore proposed to be formally terminated on 29 February 2000.

The Company however remains firmly committed to continue (sic) to (sic) in good faith consult on the implementation of the Company's proposed rationalisation measures, inclusive of Clive Jones's formal retrenchment, even after the implementation thereof."

[14] In one paragraph of the memorandum the appellant said that, in the light of a number of matters which are set out therein, it had **“no real alternative but to formally retrench [the second respondent] with effect from 01 February 2000 and without the benefit of a severance package”**. In another it proposed that the second respondent’s services be formally terminated on the 29th February 2000. Indeed, in the last paragraph the appellant said that it remained committed to continuing to consult in good faith **“on the implementation of the [appellant’s] proposed rationalisation measures inclusive of the second respondent’s formal retrenchment, even after the implementation thereof.”**

[15] A meeting took place between the appellant and the union on the 7th February. At the meeting the union proposed that the second respondent go back to the position of order make-up at a salary rate lower than the salary he was earning at the time. That position was on a lower grade than that of a forklift driver. The salary was lower as well.

The appellant could not respond to this proposal immediately but undertook to consider the proposal and revert to the union. It was anticipated that another meeting would be held at which the matter would be discussed further.

[16]The appellant only responded to the union's proposal on the 16th February. It did so by way of another memorandum. The

heading of the memorandum was: **"OCGAWU's employee bumping request."** The rest of the contents of the document read thus:-

"OCGAWU proposed that the Company consider the employment of Clive Jones in his previous Newmarket Order Make-up position, as a viable and feasible alternative to the Company's proposed retrenchment.

Employees on a higher job grade and wage rate, with suitable skills and longer service, who have been earmarked for retrenchment, may apply to be demoted to a lower position and wage rate, where the incumbent (sic) of that position has shorter service, subject to and

**conditional on the Company's
operational and business related
requirements.**

Where the Company's operational and business related requirements allow for such demotion and bumping of a lower grade and paid employee, the lower grade and paid employee will be retrenched in favour of the higher grade and paid employee.

In the light of the above and after careful and due consideration of OCGAWU's request in this regard and the Company's operational and business related requirements, the Company has decided to allow Clive Jones the opportunity to be appointed in his previous position as a New Market Order Make-up and at the associated lower job grade and wage rate, with effect from Thursday 17 February 2000.

Clive Jones is accordingly required to report for work on Thursday, 17 February 2000 to commence to execute his normal duties and responsibilities as a New Market Order Make-up.

The Company will on a best endeavour basis try to accommodate the New Market Order Make-up, with shorter service than Clive Jones and who Clive Jones will bump elsewhere in the Company, failing which the Company will have no real alternative in the absence of meaningful viable and - or feasible alternative to the contrary, but (sic) formally retrench the employee concerned, with effect on 01 March 2000 and terminate his services on 31 March 2000.

[17] The second respondent did not report for duty on the 17th February. It is not clear whether he learn't of the contents of the appellant's memorandum of the 16th but decided not to report for duty or whether he was not aware of its contents. The union wrote a letter to the appellant in response to the memorandum of the 16th. In its letter the union accused the appellant of creating **"the wrong impression that the union wants somebody from New Market Order make-up to be retrenched to make place for [the second respondent]."** It said that this was untrue. It then stated that the second respondent would accept his old job back at the lower grade and rate **"but not at the expense of another employee."** It urged the appellant **"to look again at the situation with the concern (sic) in mind and revert back (sic) to the union."** It also asked whether somebody could not be trained **"from New Order Make-up to drive [the second respondent's hyster]".** The last sentence of the letter was to the effect that the union's **"above comments"** were without

prejudice **“to our pursuance (sic) of the matter through the CCMA, however, we hope an amicable settlement is possible.”**

[18] The appellant replied to the union's letter by way of a memorandum dated the 23rd February 2000. In the memorandum the appellant stated that it had agreed to a proposal that had been made by the union to appoint the second respondent in the New Market Order Make-up position but the union had, by its letter of the 17th February, changed its mind on this. The appellant stated that it had agreed to appoint the second respondent with effect from the 17th February. It said that the second respondent and the union **“do not want [the second respondent's] appointment to his previous positing (sic), where his appointment would necessitate the retrenchment of the employee currently employed in that position”**.

[19] The appellant then stated that the second respondent had accordingly **“not accepted the**

[appellant's] offer of employment and has not reported for work on Thursday 17 February 2000 or thereafter, with the (sic) view to execute the duties and responsibilities associated with his previous position." The last four paragraphs of the memorandum read thus:-

"The [appellant] has undertaken to try and accommodate the employee, who is currently employed in [the second respondent's] previous position, elsewhere within the [appellant], failing which, the [appellant] would have no real alternative, but (sic) formally retrench that employee with effect from 01 March 2000.

In the light of the above and in the absence of any meaningful, viable and/or feasible alternatives to the contrary, the [appellant] has no real alternative, but to confirm [the second respondent's] retrenchment with effect on (sic) 01 February, 2000.

[The second respondent's] services with the [appellant] will accordingly be formally terminated on 29th February, 2000.

The [appellant] accordingly invites our employees and their collective bargaining representative, OCGAWU, to consult with the [appellant] on the [appellant's] rationalization measures, inclusive of [the second respondent's] proposed retrenchment."

[19] On the 24th February the union responded to the appellant's memorandum of the 23rd. It said that the second respondent would report for work on the 28th February 2000 but that this did not mean that the union or the second respondent **"accepts the retrenchment of another employee."** In the letter the union also expressed the hope that the appellant would manage to place the employee who occupied the second respondent's previous position elsewhere. It concluded the letter by proposing a meeting between itself, the appellant, the second respondent and the employee

concerned on 29th February 2000 at 14h00. That was going to be on the second day of work after the second respondent's return to work on the 28th February if the appellant accepted the union's proposal.

[20] The appellant did not respond to the union's letter of the 24th February prior to the 28th February. On the 28th February the appellant issued a memorandum as a response to the union's letter. In the memorandum the appellant did not accept the union's proposal for a meeting to be held on that day. The memorandum read thus:-

“We refer to the OCGAWU letter, dated 24 February, 2000, concerning OCGAWU's notice that OCGAWU and Clive Jones have conditionally accepted the Company's offer of employment and that Clive Jones would be reporting to work on Monday, 28 February, 2000, with the view to execute his previous duties and services as the NMCS Order make up worker.

A material term and condition of the Company's offer of employment to Clive Jones was that Clive Jones had to report for work on Thursday, 17 February, 2000, which he has failed and/or refused to do.

In the light of the above, the Company's commitment to try to accommodate the current incumbent of Clive Jones' position elsewhere within the Company and the Company's commitment to continue with employee consultations, collective and otherwise, the Company is of the opinion that OCGAWU's original objection to the Company's employment offer, Clive Jones' failure and/or refusal to timeously report for work and Clive Jones' and OCGAWU's current, belated and conditional acceptance of the Company's employment offer, are unreasonable and unacceptable to (sic) the extreme.

The Company's view is that Clive Jones nor (sic) OCGAWU has timeously accepted the

Company's offer of employment and the Company cannot be reasonably expected to condone the belated acceptance thereof a calendar week after the event on a conditional basis.

The Company's employment offer was not at the time open for a conditional acceptance.

Despite the fact that OCGAWU and Clive Jones have ostensibly accepted the Company's employment offer, OCGAWU is in bad faith still keeping their and Clive Jones' options open by pursuing OCGAWU's CCMA dispute in this regard.

In the light of the above and in the absence of any meaningful, viable and/or feasible alternatives to the contrary the Company has no real alternative, but to once again confirm Clive Jones' retrenchment with effect on (sic) 01 February, 2000.

Clive Jones will therefore not be allowed to

report for work on Monday, 28 February, 2000 and his services with the Company will be formally terminated on 29 February, 2000.

The Company once again invites our employees and their collective bargaining representative, OCGAWU, to consult with the Company on the Company's rationalization measures, inclusive of Clive Jones' retrenchment."

[21] It will be seen from the appellant's memorandum of the 28th February that:-

- a) the appellant complained that the union and the second respondent had provided a conditional acceptance of its offer when its offer had not been open for a conditional acceptance;
- b) in terms of the appellant's offer to the union and the second respondent, the second respondent was supposed to report for work

on the 17th February but he had failed to do so;

- (c) the appellant was not prepared to accept a belated acceptance of the offer;
- d) there were no viable alternatives to the second respondent's retrenchment "but to once again confirm the [second respondent's] retrenchment with effect from 01 February, 2000;
- e) the second respondent would not be allowed to report for work on Monday 28 February 2000 and his services with the appellant would be formally terminated on 29 February 2000.

[22] In accordance with the contents of the union's letter of the 24th February the second respondent presented himself at the appellant's gate on the morning of the 28th February. He was refused entry into the premises and was given the appellant's

memorandum of the 28th February. The second respondent's last day in the appellant's employment was the 29th February.

Proceedings in the Labour Court

[23] A dispute then arose between the appellant, on the one hand, and, the union and the second respondent, on the other, on the fairness of the dismissal. In due course the dispute was referred to the Labour Court for adjudication. The matter came before Gamble AJ. Gamble AJ, after hearing evidence and arguments, delivered a judgement to the effect that the second respondent's dismissal was both substantively and procedurally unfair. He ordered that the second respondent **"be reinstated with immediate effect in the position that he held on 31 January 2000 on the same terms and conditions of employment that prevailed at the time, with retrospective effect as from the date of dismissal"**, that the second respondent repay the value of the retrenchment package received from the appellant or alternatively that the appellant could set the value of the package off against the back-pay. He ordered the appellant to pay the first and second respondents' costs. Subsequently he granted the appellant leave to appeal to this Court.

The appeal

[24] On appeal the appellant challenged the Court a quo's finding that the dismissal was both substantively and procedurally unfair as well as the order that the second respondent be reinstated and, that the reinstatement be to the position which the second respondent occupied as at 31 January 2000 which was that of a forklift driver. I

propose to deal first with the finding of substantive fairness.

[25] The Court a quo acknowledged, quite correctly in my judgement, that the appellant had an acceptable reason for its decision to reduce the forklift drivers from five to four. It also held that the second respondent's dismissal was not effected for the reason of implementing the system of four forklift drivers. It said that as of 31 January 2000 the proximate cause for the second respondent's dismissal was his refusal to go on to the staggered shift.

[26] It seems from the judgement of the Court a quo that the appellant's Counsel argued the matter in the Court a quo on the basis that the appellant's decision to dismiss the second respondent was taken on the 23rd February. With that argument in mind, the Court a quo said that the reason for the second respondent's dismissal given in the appellant's memorandum of the 23rd February is that **“(t)he company has no real alternative, but to confirm [the second respondent's] retrenchment with effect on (sic) 01 February 2000.”** The Court a quo went on to say that, if regard is had to the appellant's memorandum of the 28th February, the reason given for the second

respondent's dismissal was **"[the second respondent's] failure and/or refusal to timeously report for work and [his] current, belated and conditional acceptance**

of the [appellant's] employment offer ..." The Court a quo then concluded that that reason for dismissal did not bring the second respondent's dismissal within the ambit of a dismissal for operational requirements and that, therefore, the appellant had failed to establish a fair reason for the second respondent's dismissal.

[27] I cannot fault the Court a quo's conclusion that the appellant failed to establish a fair reason for the second respondent's dismissal. In terms of the Act once it has been established that a dismissal occurred, the employer bears the onus to prove that there was a fair reason for the dismissal. If the employer relies on operational requirements to show the existence of a fair reason to dismiss, he must show that the dismissal of the employee could not be avoided. That is why both the employer and the employee or his representatives are required by sec 189 of the Act to explore the possibilities of avoiding the employee's dismissal.

[28] In this case, the union and the second respondent made a proposal to the appellant that the latter be demoted to a position he had held before he was promoted to the position of a forklift driver. That was the position of an **"order make-up."** It entailed that the second respondent would be

downgraded and that he would take a cut in his salary. Obviously the union and the second respondent made this proposal in order to avoid the second respondent's dismissal. The appellant found the proposal acceptable and conveyed its acceptance thereof to the union by way of its memorandum of the 16th February. If the appellant's acceptance of the union's proposal is proof of anything, it is proof of the fact that the appellant's operational requirements could accommodate the second respondent's continued employment by the appellant. The appellant's operational requirements did not dictate that he should be dismissed.

[29] Once it is accepted that as at the 16-17th February the appellant's operational requirements could not be relied upon as a fair reason for the second respondent's dismissal, the appellant has to show what operational requirements emerged thereafter which justified the second respondent's dismissal. There is no doubt that, after the second respondent did not report for work on the 17th

February as required in the appellant's memorandum of the 16th February, the appellant used that as the reason to justify retrenching him. That can be gathered from the appellant's memorandum of the 23rd February as well as that of the 28th February. In the latter memorandum the appellant said how unacceptable it was to it that the union's response was, as

far as the appellant was concerned, a conditional acceptance and that the second respondent had failed to report for work on the 17th February but had only accepted the appellant's offer a week later. The appellant said that it could not reasonably be expected **"to condone the belated acceptance of its offer a calendar week after the event on a conditional basis."** It then said that the **"[second respondent] will therefore not be allowed to report for work on Monday 28 February, and his services with the [appellant] will be formally terminated on 29 February 2000."**

[30] The appellant took more than a week to consider the union's proposal that the second respondent be demoted to the position of an order make-up. The appellant has not proffered any reason why it was so critical that the second respondent report for duty on the 17th February. A week after the 17th February - that is on the 23rd February - the union had sent the appellant a letter which the appellant itself regarded as an acceptance of its "**offer**". It is not necessary to consider whether the appellant's memorandum of the 16th February contained the appellant's offer to the union and the second respondent to demote the latter to the position of order make-up or whether it contained an acceptance by the appellant of an offer that had been made by the union and the second respondent. For present purposes this is of no consequence. The fact of the matter is that by the 17th February the appellant's operational requirements could accommodate the second respondent's continued employment by the appellant and this was acceptable to all parties.

[31] Both parties seemed to have been confused by how the incumbent of the position that the second respondent was going to take would be dealt with. First, the union seems to have read the appellant's memorandum of the 16th February as suggesting that the union had proposed another employee's dismissal to make way for the second respondent. Then the appellant thought that the union was not prepared to let the second respondent take up his old position if this could lead to another employee being dismissed.

[32] The position is that the union's proposal that the second respondent be demoted to his previous position meant by its very nature that the employee who occupied that position at the time would have to leave that position to make way for the second respondent. Once he had left that position, unless another position could be found where he could be accommodated, he would have to be dismissed for operational requirements. That was the necessary implication of the proposal and the union must have known it when it made the proposal because they knew that another employee occupied that position. Otherwise, what did they think would happen to that employee if he could not be accommodated within the appellant?

[33] The appellant's memorandum of the 16th February was simply conveying what was obvious from the

union's proposal. The union's statement in its letter of the 17th February that the second respondent would not take up his old position if this meant that another employee would lose his job made no sense, especially because the appellant had made it clear in its memorandum of the 16th February that it would do its best to try and accommodate the said employee but could not give any guarantee. If the matter had ended at this stage and the Court was called upon to decide whether there was a fair reason for the second respondent's dismissal, I would have had great difficulty in concluding that there was no fair reason for the dismissal of the second respondent because it would have been shown that the appellant had a legitimate reason to do away with the day shift and, the second respondent would have rejected a reasonable alternative for no sound reason. That is, however, not where the matter ended before it was taken to court.

[34] After stating in effect that it found the second respondent's failure to report for duty on the 17th

February and the union's conditional acceptance of its offer unacceptable, the appellant invited the union and the second respondent in the last paragraph of its memorandum of the 23rd February **“to consult with the [it] on the [its] rationalisation measures inclusive of [the second respondent's] retrenchment.”** The union took advantage of this invitation. In its letter of the 24th February it said that the second respondent would report for duty on the 28th February. It further said that this did not mean that the union and the **“second respondent accepted’ the retrenchment of another employee”** and expressed the hope that **“the [appellant] manages to place the other employee in other (sic) position.”** It also proposed a meeting for the 29th February.

[35] It is clear from the union's letter of the 24th that the union was no longer taking the stance it had taken in its letter of the 17th February that the second respondent would not accept his old job at

the expense of another employee. The union would have been entitled to reserve its rights with regard to any subsequent dismissal of another employee and to challenge the fairness thereof if it felt aggrieved. It did not have to agree in advance not to challenge any subsequent dismissal even if it felt that such dismissal was unfair for any reason other than that it arose from a “**bumping exercise**”. Once the appellant had invited the union and the second respondent in its memorandum of the 23rd to further consultation, the union was entitled to make a proposal – which it made in its letter of the 24th – that the second respondent report for duty on the 28th.

[36] Although the union did not expressly state in its letter of the 24th that the second respondent’s reporting for duty on the 28th would be pursuant to its proposal of the 7th February and the appellant’s response thereto of the 16th February, it is crystal clear that it was. Indeed, the appellant also understood it that way. This is clear from its

memorandum of the 28th. There it referred to the union's letter of the 24th as the acceptance of its offer. Since the appellant had found the idea that the second respondent take up the position of an order make-up acceptable only a week before, the onus was on it to show why that idea was no longer acceptable a week later. The appellant failed dismally to show this. There is no doubt that the second respondent could have been accommodated in the position of an order make-up. In the light of this I have no hesitation in concluding that no fair reason was shown for the second respondent's dismissal. Accordingly, the dismissal was substantively unfair.

[37] In the light of my conclusion that the dismissal was substantively unfair, I think it would serve no useful purpose to consider whether it was also procedurally unfair. Whatever I can find on that issue will have no practical effect on either party. It will not affect the relief in any way nor will it affect costs.

[38] The next question is the issue of relief. The Court a quo made an order that the second respondent be reinstated as a forklift driver as well as an order for the payment of compensation. The appellant contended that the order of reinstatement should not have been granted. I do not think that the Court a quo should have

ordered that the appellant reinstate the second respondent in the position of a forklift driver as it did. The appellant had a legitimate and acceptable reason for wanting to do away with the day shift which the second respondent worked. That much was acknowledged by the Court a quo. The second respondent had made it clear over a long period that he was not prepared to work the staggered shift due to his church commitments in the evenings.

[39] The foregoing does not, however, mean that no order would be appropriate which would ensure that the second respondent is taken back into the appellant's employment. I think that fairness requires that, if at all possible, the order that is granted should be one that will ensure precisely that. The position to which he should be taken back is the one of an order make-up. He should retain his service but his salary and other terms and conditions of employment should be those applicable to an employee employed as an order make-up. He had already indicated that he was agreeable to taking up that position together with the grade and wage rate applicable to it. There is also no reason why the appellant should not be ordered to in effect pay the second respondent the salary that he would have been paid in the position of an order make-up had he not been dismissed.

He tendered his services on the 28th February and the appellant rejected this. Accordingly, I propose to make an order that will have this effect. It is hoped that the appellant will do its best to try and accommodate the other employee elsewhere within the company but, of course, the appellant may end up having to dismiss the present incumbent of the position that the second respondent will take up. Provided there is a fair reason to do this and a fair procedure is followed, the dismissal will be fair.

[40] In conclusion the above means that the appeal succeeds in part and fails in part. I think the partial success of the appellant is so negligible that it should not affect the issue of costs. The respondents have, without any doubt, achieved substantial success and should be awarded their costs.

[41] In the result I make the following order:-

1. Subject to (2) and (3) below, the appeal is dismissed with costs.
2. The appeal against the order of the Court a quo that the position to which the second respondent was reinstated is the position he held as at 31 January 2000 is hereby upheld.

3. The order contained in paragraph 123.2 of the judgement of the Court a quo is set aside and is replaced by the following order:-

“The respondent is ordered to:

- (a) take the second applicant back in its employ in the position of an order make-up on terms and conditions of employment applicable to that position.**
- (b) pay the second applicant an amount equal to the salary that he would have been paid as an order make-up for the period from the 28th February 2000 to date had he not been dismissed.**
- (c) treat the second applicant on the basis that his service period was not interrupted by his dismissal.”**

Zondo JP

I agree.

Hlophe AJA

I agree

Du Plessis AJA

Appearances:

For the appellant: Mr M.W. Janisch
Instructed by: Cliff Dekker Fuller Moore INC

For the respondent: Mr L.J. Krige
Instructed by: Rabkin-Nicker & Williams Attorneys

Date of judgement: 23 May 2003

Date of hearing: 25 September 2002